

m e m o r a n d u m

to: Southborough Zoning Board of Appeals
from: Deborah S. Horwitz
date: April 1, 2003
re: Fairfield Realty, LLC (the "Applicant") Comprehensive Permit Application
(the "Project")

This Memorandum is in response the request of the Zoning Board of Appeals (the "Board") for a legal memorandum regarding the applicability of M.G.L. c. 40B §§20-23 ("Chapter 40B") to the portion of the Project located in Southborough.

As the Board knows, the bulk of the Project is located in Marlborough and has access to Northborough Road over a private way in Southborough. Town Counsel, Aldo Cipriano, noted in his letter to the Board dated January 30, 2003, that it is "well established that access to a use is an extension of the use." The use of the Project is multifamily residential. The private way in Southborough is in an Industrial Park District, in which residential uses are prohibited. There is no provision in the Southborough Zoning By-Law authorizing any permit granting authority to issue any sort of special permit or special exception for a residential use in an Industrial Park District. Therefore, in order to use the access way for residential use, the applicant needs relief from the requirements of the Southborough Zoning By-Law.

Because the Project and the applicant meet the jurisdictional requirements of Chapter 40B, the Applicant is entitled to pursue a comprehensive permit in order to obtain such relief from the otherwise applicable zoning requirements. Evidence of the Project and the Applicant meeting those jurisdictional requirements was submitted to the Board in the Comprehensive Permit Application and at the public hearing of the Board on February 27, 2002.

As a reminder, the regulations that implement Chapter 40B require an applicant for a comprehensive permit to meet the following three tests:

- (1) the applicant must be a public agency, limited dividend entity or non-profit organization;
- (2) the application must be fundable by a subsidizing agency under a low or moderate income housing subsidy program; and

- (3) the applicant must have control of the project site.

See Section 31.01 of 760 CMR 31.00 et. seq. (the "Regulations").

The first requirement, limited dividend status, was satisfied by submission to the Board of a certified copy of the Applicant's Certificate of Formation containing the appropriate limited dividend language. The second requirement, fundability, was satisfied by submission to the Board of a Site Approval Letter from Massachusetts Housing Finance Agency dated February 14, 2003 (the "Site Approval Letter"). The third requirement, site control, was established by the submission to the Board of a purchase and sale agreement. Therefore, the Applicant has established that it meets the threshold requirements that enable it to apply for a comprehensive permit under Chapter 40B.

There are no provisions in Chapter 40B or the Regulations requiring a project for which permitting is sought under Chapter 40B to be located in a single municipality. To the contrary, Chapter 40B and the Regulations both consistently and strongly refer to the regional need for housing. For instance, the definition of "consistent with local needs" in Section 20 of Chapter 40B states that "requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing...." That section of Chapter 40B has been interpreted by the Massachusetts Supreme Judicial Court to mean that the failure of a municipality to meet its minimum housing obligations (10% of the municipality's total housing stock) provides compelling evidence that the regional need for housing outweighs any objections to a proposed comprehensive permit project. Board of Appeals of Hanover v. Housing Appeals Committee 294 N.E.2d 393, 363 Mass. 339 (1973).

The Regulations provide further evidence of the centrality of the regional need for housing under Chapter 40B. In Section 31.06(6), the Regulations provide that "[i]n the case of a denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space or other local concern with supports such denial, and then, that such concern outweighs the regional housing need." In Section 31.06(7), the Regulations provide that "[i]n the case of an approval with conditions ... the Board shall the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need." The Regulations go even further in Section 31.07(1)(e), which formalizes the Court's decision in the Hanover case by providing "[p]roof that a town has failed to satisfy one of the statutory minima described in 760 CMR 31.04(1) and (2) shall create a presumption that there is a substantial regional housing need which outweighs local concerns." As the Board knows, according to the current Massachusetts Department of Housing and Community Development Chapter 40B Subsidized Housing Inventory, 2.34% of the total housing stock of Southborough is affordable, well short of the minimum 10% set in the statute.

Since the Applicant and the Project have met the jurisdictional prerequisites for obtaining a comprehensive permit under Chapter 40B and the Regulations, and neither Southborough nor Marlborough has met the statutory minima for affordable housing set forth in the Regulations, there is a presumption that a regional need for housing exists and a comprehensive permit for the Project is appropriate.

Our conclusion is reinforced by a telephone conversation we had with Werner Lohe, Chairman of the Housing Appeals Committee, prior to the proceeding with the comprehensive permit application for the Project. In that conversation, we gave the Chairman the following facts: all of the housing units in the project are located in one municipality; primary access to the project (but no building) is located in a second municipality; zoning relief is required in both municipalities; and neither municipality has met its statutory minima. Based on that set of facts, Chairman Lohe concurred that it would be appropriate to use the comprehensive permit as the vehicle for obtaining the necessary zoning relief from both communities because of the focus in Chapter 40B and the Regulations on the regional need for housing.